to our conception of a proper equipoise of justice, for American courts realize that it is but an application of the vicious and barbarous maxim that "might makes right." [16] They recognize, moreover, the absurdity of holding that A has an absolute and indefeasible property in the waters of Whiteacre and the right to withdraw them *ad libitum,* when B, the owner of the adjoining Blackacre, may at any moment wrest them from him and leave him without redress.[17] They question how there can be an absolute property right held by such a doubtful and precarious tenure; and they make a distinction between the existence of an absolute right and the total absence of any right that the law will recognize and protect.

The reason advanced in support of the more rigid rule as to percolating waters was said to be based on the fact that their movements are so screened from observation and so little known that no proof concerning them could be satisfactory. However, the researches of science have thrown so much light upon the subject that proof concerning percolating waters may in most cases be almost as convincing and satisfactory as that relating to surface waters.[18]

It has been said, too, that, should the English rule be not adopted, such an element of uncertainty would be injected into property rights as to unsettle them, and hamper landowners in the development of their property. The reasoning on which this contention reposes is näive and faulty. It is submitted that, instead of having such an effect, the more liberal rule serves to protect the rights of the owner of realty by eliminating fortuities that in some cases might encompass his financial ruin.[19]

LIABILITY TO ADJOINING LANDOWNERS FOR DAMAGE BY VIBRATION OF EARTH AND AIR.—Where one in blasting on his own premises and for a lawful purpose, hurls rocks, earth and other flying debris on the premises of another, it is ***damnum cum injuria*** and the Courts have agreed in holding the defendant liable whether he was negligent or not.[1]

This is but another illustration of the familiar principle that where an act lawful in itself may naturally result in legal injury to another, the actor must at his peril see to it that the injury does not occur, or else must expect to respond in damages. Undoubtedly

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[16] Katz *v.* Walkinshaw, *supra;* Meeker *v.* City of East Orange, *supra.*
[17] Meeker *v.* City of East Orange, *supra.*
[18] Meeker *v.* City of East Orange, *supra;* Hathorn *v.* Dr. Strong's Saratoga Springs Sanitarium, *supra.*
[19] Katz *v.* Walkinshaw, *supra;* Meeker *v.* City of East Orange, *supra.*
[1] Hay *v.* Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279; G. B. & L. Co. *v.* Eagles, 9 Colo. 544, 13 Pac. 696; Tiffin *v.* McCormick, 34 Ohio St. 638, 32 Am. Rep. 408; Carman *v.* Ry. Co., 4 Ohio St. 399; Langhorne *v.* Turman, 141 Ky. 809, 133 S. W. 1008.

the defendant has full power to use his own premises in a lawful manner but his mode of enjoyment of his property is limited by the legal rights of the plaintiff under the maxim *sic utere tuo ut alienum non laedas*. Not only has the plaintiff's legal right to the reasonably quiet and peaceable possession and enjoyment of his property been violated, but in addition his close has been broken and entered by instrumentalities intentionally set in motion by the defendant, and not confined by him to the boundaries within which it was his duty to restrain them.[2]

A more difficult question is presented when the damage is caused not by rocks or other flying debris, but by the vibration or concussion of earth or air. Here the courts are divided as to the liability of the defendant.

I. According to the majority view damage resulting from mere vibration or concussion of earth or air is not actionable, on the ground of *damnum absque injuria,* where the defendant is not negligent.[3] The basis of the rule is that not mere damage alone, but also a violation of the plaintiff's legal right must be shown before an action lies for the tort. And where under the circumstances of the particular case the defendant's right to a reasonable use of his land consisted, in part, in the right to use explosives, there being no technical trespass by flying debris, the defendant cannot be held liable in the absence of negligence. Any contrary rule, at least where the work is of a temporary character, and where the defendant has exercised due care, would contravene public policy as tending to hinder the building up and growth of towns, by giving to the first comer in a rocky country the right to demand from subsequent purchasers near-by damages for purely consequential injuries.[4] But where the blasting is not of a temporary character but is carried on as a regular mode of user of the premises, as in the case of a rock quarry, the defendant is maintaining a nuisance and is liable for damages from vibration.[5] Of course where actual negligence is shown the defendant is liable.[6]

II. According to the minority view which obtains in only several States of the Union, damages from vibration of earth or air is actionable as *damnum cum injuria* regardless of the exercise of due care.[7] This view was upheld in the recent case of *Patrick* v. *Smith* (Wash.), 134 Pac. 1076. These courts base their holding on a

[2] At common law since the plaintiff's close has been broken and entered and since the injury is direct and immediate the action of trespass lies, and not trespass on the case. Scott *v.* Bay, 3 Md. 431.

[3] Booth *v.* Rome, etc., Co., 140 N. Y. 267, 35 N. E. 592; French *v.* Vix, 143 N. Y. 90, 37 N. E. 612; Simon *v.* Henry, 62 N. J. L. 486, 41 Atl. 692.

[4] Booth *v.* Rome, etc., Co., *supra.*

[5] Longtin *v.* Persell, 30 Mont. 306, 76 Pac. 699.

[6] Page *v.* Dempsey, 184 N. Y. 245, 77 N. E. 9; Newell *v.* Woolfolk, 91 Hun 211, 36 N. Y. Supp. 327.

[7] Colton *v.* Onderdonk, 65 Cal. 155, 10 Pac. 395; Hickey *v.* McCabe, 30 R. I. 346, 75 Atl. 404.

strict construction of the maxim *sic utere ut alienum non laedas,* and place an absolute liability on whomsoever makes use of dangerous explosives, even on his own premises, to the damage of another. The use of explosives is in itself lawful, but when the natural though not necessarily the probable consequence of such use is to damage the property of another then it is, to the extent of such use, unreasonable and violates the legal right of the plaintiff to the reasonably quiet and peaceable possession and enjoyment of his premises. Further these courts do not distinguish in principle the cases of damage by flying debris and of damage by mere concussion, but hold the defendant guilty of a physical invasion of the plaintiff's premises in the latter case as much as in the former, since in both the unreasonable act of the defendant, violating the plaintiff's legal right, is the force which underlies the damage. The temporary character of the work and the impossibility of improving the property otherwise than by blasting is no reason why the defendant should not respond in damages to the plaintiff for injury done, despite the possible hindrance to building, and money so expended is merely a part of the cost of improving property.[8] Where blasting is carried on in a thickly settled district and near-by property owners have suffered loss from vibration or concussion of earth or air some cases have held that this fact alone and of itself makes the liability of the defendant absolute, on account of the intrinsic danger of the operations.[9] On this some weight was laid in *Colton* v. *Onderdonk*,[10] while in *Patrick* v. *Smith*,[11] and in *Hickey* v. *McCabe*,[12] the particular point, although not mentioned in the opinion was apparently pertinent, the *res* in the former case being located "on the outskirts of the city of Seattle," and in the latter case "in the city of Providence." The measure of damages caused by vibration or concussion is the cost of restoring the property to its former condition.[13]

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[8] A striking analogy exists between the view announced in these cases and the English doctrine (typified by the great case of Rylands *v.* Fletcher, L. R. 3 H. L. 330) to the effect that one keeping or storing on his premises any substance likely to do damage if it gets beyond control is making an unreasonable use of his property and must at his peril see to it that no one suffers loss therefrom, or else must expect to respond in damages. It is also worthy of notice that some of those jurisdictions which maintain the majority view as to damage by concussion have criticised and, in part at least, have overruled the doctrine of Rylands *v.* Fletcher and have substituted for it the rule of liability only for negligence. Losee *v.* Buchanan, 51 N. Y. 476, 10 Am. Rep. 623; Marshall *v.* Wellwood, 38 N. J. L. 339, 20 Am. Rep. 394 The doctrine of Rylands *v.* Fletcher, *supra,* applies to case of damages by concussion, regardless of the question of due care. Bradford *v.* St. Mary's Woolen Mills, 60 Ohio St. 560, 54 N. E. 528.

[9] Braun *v.* Fitzsimmons, 199 Ill. 390, 65 N. E. 249; City of Chicago *v.* Murdoch, 212 Ill. 9, 72 N. E. 46.

[10] *Supra.* [11] *Supra.* [12] *Supra.*

[13] Colton *v.* Onderdonk, *supra;* Fitzsimmons *v.* Braun, *supra.* Under this view that the shock of concussion is the physical invasion of the plaintiff's premises by the defendant, it would seem that trespass would lie at common law.